LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 1 1949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 132.

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

On Writ of Certiorari to the Court of Claims.

BRIEF AMICI CURIAE OF R. T. C. NO. 11 CORPORATION, SMITH-DOUGLASS COMPANY, INC., AND FALL RIVER NAVIGATION COMPANY.

CHARLES B. McINNIS
Counsel for Amici Curiae
Transportation Bldg.
Washington 6, D. C.

INDEX.

	Page
Preliminary Statement	1
The ZEPHYR	2
The INTERNATIONAL	4
The WILLIAM C. ATWATER	5
Argument	7
Conclusion	11

CITATIONS.

CASES

Smith-Douglass Company, Inc. v. United States, Court of Claims, No. 46,289, decided on December 6, 1948	4
United States v. Felin, 334 U.S. 624	6

STATUTES

General Requisition Act of 1941, 55 Stat. 742; 56 Stat. 176	7
Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 52 Stat. 962, and 53 Stat. 1255; 46 U.S.C. Sec. 1212	2, 5, 6, 7, 10
Renegotiation Act, 58 Stat. 88	7
Act of October 10, 1946, 54 Stat. 1090	7

MISCELLANEOUS

Hearings before House Committee on Merchant Marine and Fisheries, on H. R. 2731, 78th Cong., 1st Session	9, 10
War Shipping Administration, Doc. 20	2, 4, 6, 8
War Shipping Administration, Doc. 20-A	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 132.

THE UNITED STATES, *Petitioner*

v.

RICHARD S. COBB, *Respondent.*

On Writ of Certiorari to the Court of Claims.

BRIEF AMICI CURIAE OF R. T. C. NO. 11 CORPORATION, SMITH-DOUGLASS COMPANY, INC., AND FALL RIVER NAVIGATION COMPANY.

Preliminary Statement.

The issues raised by the instant case are of the most profound importance to each of the *Amici Curiae*. This is conceded by Petitioner which lists their vessels in Appendix D to its brief. Each company at the time that the United States entered the Second World War owned a vessel, which had been acquired with its own funds for use

in his own business. In each case the vessel was requisitioned for title by the War Shipping Administration, and in each case the interpretation urged by Petitioner of Section 902 of the Merchant Marine Act, 1936, would result in what the War Shipping Administration urged and the Comptroller General admitted is a "hardship". The situation of one of these vessels was described by the War Shipping Administration in a letter to the Comptroller General as "typical." (War Shipping Administration Doc. 20, p. 185).

While there is complete agreement with the argument made in the brief for Respondent in this case, it is believed that the further considerations herein contained should be before this Court when it considers the novel rule for determining just compensation advocated by Petitioner.

The ZEPHYR.

The facts regarding this ship were considered by the War Shipping Administration as "typical," for the purpose of illustrating to the Comptroller General and testing with him the unfair and unreasonable results flowing from his interpretation of Section 902 which the Petitioner now advocates. The Comptroller General admitted that his interpretation involved "hardship" but contended that "the injustice—if such it may be called—of construing the language of Section 902(a), as it is written does not reach such shocking proportions as to warrant the conclusion that the Congress could not have meant what it said," and insisted upon payment of the low 1939 market prices for vessels purchased in the higher 1941 market (WSA Doc. 20, pp. 186-190). The following statements concerning the ZEPHYR are taken from Admiral Land's letter of April 27, 1943, to the Comptroller General (WSA Doc. 20, pp. 184-186):

> "In the fall of 1941, the R. T. C. No. 11 Corporation acquired this vessel * * * in Cleveland, Ohio. The pur-

chase price paid in cash * * * was the sum of $262,500, or $116 per ton. The vessel was at that time on the Great Lakes, and the purchaser wished to use it in the Atlantic. * * * "

"The owners advise that the costs of bringing the vessel to New York and the improvements and betterments placed on the vessel by them total $43,314. The total investment, including repairs, raises the actual cost of the vessel to about $135 per ton.

* * * * The First National Bank of Boston lent to the owner the sum of $166,000, or about $74 per ton, secured by a first preferred mortgage lien on the vessel about the time of acquisition.

* * * * * *

"Our investigation discloses that there was no intercompany connection or relationship of any kind between the buyer and seller. * * * The transaction was made completely at arm's length * * * . To summarize:

1. The tanker was worth about $55 per ton in 1939.
2. The buyer paid $116 per ton in 1941.
3. The First National Bank of Boston loaned $74 a ton on the tanker in 1941 to the buyer on the basis of a bona fide appraisal showing the value at $111 per ton.
4. The buyer spent over $40,000 in arranging to transfer the vessel from the Great Lakes to the Atlantic coast and in reconditioning the vessel, making a total investment by the buyer of over $305,000 or approximately $135 per ton.
5. The entire transaction was open and aboveboard."

This vessel was requisitioned for title on July 24, 1942. Under the Comptroller General's ruling, now preferred by Petitioner, it is argued that our Constitution permits and the Congress requires the courts to hold that an owner who, before we were at war but within eight months of the taking, expended for his property over $305,000, should nevertheless be paid only $123,970, thus suffering an out of pocket loss, not attributable to genuine market

decline, of $181,030, or more than 50% of his investment in the vessel. Petitioner's contention would also have the Constitution permit, and the Congress require the courts to award the owner less than the $166,000 first preferred mortgage lien on the vessel conservatively placed by a commercial bank.

It is submitted that the War Shipping Administration was correct in contending with the Comptroller General that so unreasonable a result was not intended by the Congress or permitted by the Constitution. It is submitted further that the Comptroller General was wrong in contending "that this does not reach such shocking proportions as to warrant the conclusion that the Congress could not have meant what [the Comptroller General and now the Petitioner contend] it said." (WSA Doc. 20, p. 190)

The INTERNATIONAL.

Smith-Douglass Company, Inc., the owner of this vessel, is not a shipping company but is a manufacturer of fertilizer. It purchased the INTERNATIONAL as a floating cannery and converted her into a dry cargo vessel for the purpose of using her in transporting sulphur, phosphate rock and potash from Gulf ports to its factory at Norfolk, Virginia. The following facts concerning the vessel are taken from the Findings of Fact of the Court of Claims in *Smith-Douglass Company, Inc.*, v. *United States*, No. 46,289, decided December 6, 1948.

"Plaintiff purchased the vessel on April 24, 1941, for the sum of $250,000 and in further consideration agreed to bareboat charter the vessel back to the seller for the fishing season of 1941. At the bareboat charter rate then current in the fishing industry for a vesel of this character, the charter for the vessel had a value of approximately $53,112, making a total consideration to the seller of approximately $303,112." (p. 4) The Smith-Douglass Company, Inc., converted her from a floating cannery to a "dry cargo vessel

at a cost of approximately $64,000" (p. 4), and expended a further amount of approximately $60,000 for "repairs, renewals, reconditionings, and similar maintenance work" (p. 5), prior to the date on which the vessel was requisitioned for title. Thus the investment in the INTERNATIONAL from April 24, 1941 to the date of requisition for title on October 6, 1943, aggregated $427,112. The owner insured her for $425,000 (p. 5). The Court of Claims made an award of only $290,000, as of the date of requisition.* Nevertheless, at the request of the Government, the Court of Claims made a finding of the "fair market value" of the INTERNATIONAL as of September, 1939, the rollback date urged by Petitioner herein. This "was $18 per deadweight ton, or $88,600" (p. 6).

Thus, under the interpretation of Section 902 urged by Petitioner, this Court would be required to order an award of only $88,600 for the INTERNATIONAL, or less than 25% of the owner's actual investment in the vessel during the period of approximately two years immediately prior to the date of requisition for title.

The WILLIAM C. ATWATER.

This vessel was purchased by the Fall River Navigation Company in 1927 and used in that company's regular service along the Atlantic and Gulf coasts of the United States and between various foreign ports in the Caribbean area and United States ports. She was requisitioned for title on October 27, 1943. On that date the owner's undepreciated cost of the vessel (original cost plus capital additions, less depreciation), based upon the useful life and rate of

* The award of $290,000 was based upon the Court of Claims finding of value as of the date of requisition. However, the date of requisition was after the War Shipping Administration had pursued its "line of strategy" of "reducing or otherwise destroying" ship values. (See footnote page 6, *infra*. Smith-Douglass Company, Inc., takes exception to the award based upon values after the market had been "reduced or otherwise destroyed" for the purpose of making a bargain on requisition, but that point does not arise in the instant case.

depreciation as determined by the Bureau of Internal Revenue for tax purposes, was $178,769.32.

The War Shipping Administration offered as the value of this vessel at the date of requisitioning only $14,000.00.*

Inasmuch as Petitioner's contentions respecting the enhancement clause produce results lower than those reached by the War Shipping Administration on its view of the market at the date of taking, it will appear that approval by this Court of Petitioner's contentions would result in virtual confiscation of the WILLIAM C. ATWATER.

The foregoing instances illustrate the unreasonable results reached under the Comptroller General's original interpretation of Section 902. The results are hardly less

---

*Inasmuch as the contemporaneous interpretation of Section 902(a) by the War Shipping Administration was contrary to the Comptroller General's interpretation of that Section, it may be wondered why so many ship owners were dissatisfied with the offers made by the War Shipping Administration. The explanation, in the view of these *Amici Curiae*, is this:

1. The War Shipping Administration averaged 1941 and early 1942 sales of vessels of all kinds—"lakers", laid-up ships, ships in disrepair, etc.,—and based its offers for ocean-going ships in good operating condition requisitioned in the later part of 1942 and during 1943 on these low averages. Compare Petitioner's Appendix E.

The case of the ZEPHYR is typical. Though purchased in November, 1941, as a "laker" and converted into an ocean-going vessel at a total cost of more than $305,000, the War Shipping Administration offered for her only $253,020, apart from interest, as of the date of requisitioning, July 24, 1942.

2. For many vessels the War Shipping Administration used formulae that produced results far out of line with market conditions. The case of the MacARTHUR is typical.

3. For vessels taken after the War Shipping Administration had pursued a "line of strategy" of "reducing or otherwise destroying" ship values, the War Shipping Administration measured its offers by the low price which it induced for the admitted purpose of achieving a bargain on requisition. (WSA Doc. 20, p. 197; Doc. 20A, p. 9; Petitioner's Brief, pp. 106-107, footnotes.)

The case of the INTERNATIONAL is typical. She was not taken until October 6, 1943, after the War Shipping Administration had, according to its own contentions succeeded in destroying ship values for the purpose of enjoying bargains on requisition. The War Shipping Administration offered for her only $236,018.78 (including interest) despite the fact that the owner had invested $427,112 in the vessel during the two years immediately prior to the date of requisition.

Whether this will stand up under any of criteria of *United States* v. *Felin*, 334 U. S. 624 (1948), remains to be tested. That issue does not arise in the instant case for the admitted market was equal to the lower court's award (Petitioner's Brief, p. 9, footnote).

It is significant that although the War Shipping Administration sought by every available means to secure acceptance of its low offers of compensation, it nevertheless opposed the Comptroller General's interpretation of Section 902(a) now preferred by the Petitioner.

unreasonable under his modified view inasmuch as it does not reflect accurately the movement of the market for old ships. The same applies to Petitioner's interpretation of the rules of the Advisory Board.

Argument.

Throughout its brief Petitioner seeks to compare the enhancement clause of Section 902(a) with the renegotiation law, and argues for support of its interpretation of the enhancement clause as if the purpose and effect of that clause were to limit profiteering on the Government's need for vessels during a period of national emergency (Petitioner's Brief, pp. 67, 78). We respectfully submit that there is no valid comparison between the enhancement clause and the renegotiation law.

The renegotiation law dealt with limitation of *profits* on voluntary contracts to furnish manufactured products. It expressly excepted materials such as mine products and timber that represented depletion of capital assets (58 Stat. 88).

Section 902 deals with the most sweeping power a government can assert—the taking by compulsion of capital assets which the owners need to earn their livelihood and which the owners have to replace at the market at the time and place of taking. Yet Petitioner would have this Court in a requisition case impose an out-of-pocket loss on capital assets by analogy with a statute that guaranteed costs plus a reasonable profit on a voluntary merchandise contract. If there were an analogy between the renegotiation and similar war statutes to the requisition statutes, the exceptions they make to protect capital assets and assure reasonable profits on merchandise would argue against Petitioner's contentions.

The only war-time statutes that are analogous to Section 902 are the General Requisitioning Act of October 16, 1941 (55 Stat. 742; 56 Stat. 176, 181) and the Act of October 10,

1940 (54 Stat. 1090). These required just compensation as heretofore defined by this Court, i.e., the fair market value at the time and place of taking.*

If Petitioner's construction of the enhancement clause were valid, there would be no reason why a similar provision should not be applied to the manufacturer who pro-

---

*With respect to the bearing of the other requisitioning statutes, upon the interpretation of Section 902, the War Shipping Administration stated:

"In the Second War Powers Act, Public Law 507, approved March 27, 1942, Congress adopted the rule of the *Monongahela* case in providing that property taken under the general requisition law should be compensated for as follows:

'The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under Section 2 of this Act, *but each determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.*'

"The chairman of the Committee on the Judiciary of the House of Representatives took a leading part in the discussion of this measure on the floor, and expressed his views as follows (Congressional Record, volume 88, pp. 1831, 1932):

'Now here is the citizen's guaranty of a square deal. It is in the Constitution. This is the language:

"Nor shall private property be taken for public use without just compensation."

* * * * * * *

'There is no difference between wartime and peacetime insofar as the duty of the Government and the necessity of the Government to respond in just compensation when private property is taken. Since the beginning of the Government, by judicial construction, measures of fair compensation have been established. * * *

'*No act of requisitioning and no act that this Congress can pass can limit the right of recovery guaranteed to the citizen by the Constitution of the United States.*

* * * * * *

'I do not care what you write in the statute, what rule of damages you prescribe here, you could not make the compensation less than just compensation. You may by legislation prescribe a rule that would make the Government pay more than just compensation, but you cannot make it pay less. I repeat that. *You may by legislation provide that the Federal Government must pay more than fair compensation, but you cannot effectively provide that it shall pay less.*' (Emphasis added.)

"The views of the Congress as to the *Monongahela* doctrine were thus based on an accurate consideration and acceptance of the *Monongahela* case as expounded by the chairman of the House Judiciary Committee." (WSA Doc. 20, pp. 271, 272.) (All italics in original.)

duces war goods, to the farmer who sells produce grown during a war period, or even to the laborer employed in a war plant. If the Government may seize a vessel and pay the owner for her on the basis of prices prevailing at some prior period, disregarding entirely the current prices and the cost of the vessel to the owner, there is no reason why it could not also require a manufacturer to produce war materials and pay for them at prices existing prior to the emergency, although the manufacturer would be compelled to pay current prices for his raw material, labor and other costs. Likewise, the Government could require the farmer to sell his produce at prices prevailing prior to the emergency period despite the fact that the farmer's current costs were in excess of the prices paid him by the Government. There is no more reason for singling out the ship owner and requiring him to accept less than cost for his vessel, than for requiring the manufacturer, farmer, or laborer to accept less than cost for his commodity.

The Petitioner's argument also overlooks the fact that the requisitioning of the vessels by the Government, and the payment of current prices therefor, would even then result in lesser earnings to the ship owner than to the railroads, the truck lines, bus lines and manufacturing establishments, which were permitted to operate in their usual manner, and to realize a reasonable profit by reason of continuing ownership and possession of their capital assets.

Petitioner's construction of the enhancement clause would severely penalize the citizen who is compelled to purchase a vessel for use in his regular business during any period of rising prices. He would have no protection in his acquisition of the vessel corresponding to the enhancement clause, but would be compelled to pay the prevailing market prices at the date of the purchase, just as Smith-Douglass Company, Inc., and R. T. C. No. 11 Corporation did in the instances cited herein.*

* The hardship imposed upon R. T. C. No. 11 Corporation as a result of the application of the enhancement clause in the determination of just compensation for the ZEPHYR was referred to by Admiral Land, the Adminis-

The enhancement clause as construed by Petitioner grossly discriminates between the owner of a completed vessel ready to operate and the shipyard which has available only the materials necessary to construct a vessel. The owner of a completed vessel purchased after 1939 would be required to surrender that vessel and accept just compensation determined by the method which will not return to him his cost. On the other hand, the shipyard, possessing only the raw materials required to produce a vessel, may use them in the construction of a new vessel and is permitted not only to obtain its full cost but also a fair profit.

The approval of any of the interpretations urged by Petitioner would result in a payment to those ship owners, who have not yet reached an agreement with the Maritime Commission, of an amount of just compensation less than that paid by the War Shipping Administration for comparable vessels to those who have completed their settlement. Since the Comptroller General acquired, in effect, the right of pre-audit, he has insisted that the Maritime Commission make no settlements except on his interpretation of Section 902 (Public Law No. 299, C. 414).

The Merchant Marine Act, 1936, as amended, had as a purpose the fostering of American ownership of ocean-going vessels (Sec. 101). Petitioner's construction of Section 902 is inconsistent with this purpose. Its effect would

---

trator of the War Shipping Administration, in his testimony on H. R. 2731 (78th Cong.) (pp. 11-12) as follows:

> "The document [Doc. 20] also contains two illustrative cases showing the purchase of a fishing boat and a tanker in 1941 at prices which were higher than those permissible under the proposed legislation. This raises the question as to whether a bona fide purchaser of a vessel in 1940 or 1941 who paid no more than the prevailing market price should be forced to take a loss when the vessel is requisitioned by the Government. The committee will undoubtedly wish to consider this problem."

In the same testimony Admiral Land also stated (p. 12):

> "It is generally agreed, I believe, that the enhancement clause is not a limitation upon the courts, and that in the event of litigation just compensation would be determined in accordance with judicial precedents in applying the constitutional guaranty."

be to stifle further shipping activity as soon as any emergency appeared possible. No person would dare buy a ship or even a tug during any such period no matter how badly she were needed to carry on his regular business activity, because there would always be the danger that the vessel might be seized by the Government and just compensation determined on the basis of the lower prices prevailing at some earlier date. Congress clearly intended that Section 902 be interpreted to be consistent with the whole of the Act of which it was a part.

Conclusion.

Congress could not have intended the unfair and discriminatory effects which would follow if Petitioner's construction of the enhancement clause were sustained by this Court. The Respondent's construction of that clause is consonant with the long established principles of statutory and constitutional construction, and is the only construction which will give the ship owner "just compensation" for the requisitioning of his vessel. Therefore, the construction adopted by the Court of Claims and urged by the Respondent should be sustained.

Respectfully submitted,

CHARLES B. MCINNIS
Counsel for Amici Curiae